Aldworth Company, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., Joint Employers *and* United Food and Commercial Workers Union Local 1360 a/w United Food and Commercial Workers International Union, AFL–CIO *and* William A. McCorry. Cases 4–CA–27274, 4–CA–27289, 4–CA–27603, 4–CA–27629, 4–CA–27725, 4–CA–27866, and 4–RC–19492

December 8, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On February 26, 2003, Administrative Law Judge William G. Kocol issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief and both Respondent Aldworth Company, Inc. and Respondent Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. filed answering briefs to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt his recommended Order.[3]

ORDER

The complaint allegations of Section 8(a)(5), (3), and (1) relating to the discharges of Carl Nelson, James Everidge, Stanley Wallace, and Martin Cramer are dismissed.

Margarita Navarro-Rivera and *Deena E. Kobell, Esqs.,* for the General Counsel.

Mark Peters and *Allison J. Little, Esqs. (Rubin & Rudman, LLP),* of Boston Massachusetts, for Respondent Dunkin Donuts.

Ronald I. Tisch and *Douglas C. Adams, Esqs. (Littler Mendelson, P.C.,)*, of Washington, D.C., for Respondent Aldworth.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. In *Aldworth Co.,* 338 NLRB 137 (2002), the Board concluded that Aldworth unlawfully implemented new performance standards, called the selection accuracy policy (SAP), for its warehouse employees in violation of Section 8(a)(3), (5), and (1). The Board sustained my findings that a number of employees were unlawfully terminated as a result of the implementation of the new policy but reversed my findings that employees Carl Nelson, James Everidge, Stanley Wallace, and Martin Cramer were not unlawfully terminated and remanded the case to me for further hearing. "The sole purpose of the hearing is to take evidence on whether the old SAP had been enforced less rigorously than the revised SAP." (Footnote omitted.) Id. at 148. The remanded portion of this case was tried in Philadelphia, Pennsylvania, on December 11, 2002.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Aldworth, and Respondent Dunkin Donuts, I make the following

FINDINGS OF FACT

Subpoena Issue

In anticipation of the remand hearing the General Counsel subpoenaed the overage, shortage, and damage reports and weekly selector performance reports for warehouse employees working from January 1, 1997, to June 30, 1999, from Respondents. Some of these documents, from the period October 16, 1998, to May 21, 1999, were provided to the General Counsel by Aldworth at the earlier hearing. At the remand hearing Respondents failed to produce the subpoenaed documents, explaining that they no longer were available. The General Counsel asks that I draw an adverse inference from the lack of production.

On December 31, 2000, Aldworth lost its contract to perform services for Dunkin Donuts at the Swedesboro, New Jersey facility. Aldworth employs Scott Webster as an operations

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the final paragraph of the section of his supplemental decision headed "Whether the Old SAP was Enforced Less Rigorously Than the New SAP," the judge mischaracterizes the Board's finding set forth in fn. 40 of its Decision and Order. He states that the Board "already concluded that the new SAP was less harshly enforced in reality than as written when employees were not required to undergo additional training." Contrary to the judge's statement, the Board did not find that the new SAP was less harshly enforced. See *Aldworth Co.,* 338 NLRB 137 145 fn. 40 (2002).

[3] In adopting the dismissal of allegations that the discharges of Carl Nelson, James Everidge, Stanley Wallace, and Martin Cramer violate the Act, we focus particularly on the manner in which the issue was litigated. The judge determined that the General Counsel failed to produce evidence showing enforcement disparities sufficient to establish that the four employees would not have been discharged under the old SAP production standard. The record makes clear that the judge and all the parties construed the Board's remand as requiring this approach. The General Counsel did not except to the judge's alternative analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), but instead challenged the judge's credibility findings and asserted that she had presented sufficient evidence to meet the judge's standard. As the issue has been framed before us, we find no merit in the General Counsel's exceptions and, thus, do not disturb the judge's disposition.

Chairman Battista notes that there were no exceptions to the judge's application of *Great Western Produce*, 299 NLRB 1004 (1990). See *Essex Valley Nurses Assn.*, 342 NLRB 924, 926, 927 (2004).

manager. Among other things, Webster is Aldworth's custodian of certain records. Webster credibly testified that Aldworth does not keep the subpoenaed documents but instead the client keeps them, in this case Dunkin Donuts. Nonetheless, Webster visited Aldworth's storage facility where documents are kept; Webster spent about 7 hours searching for the documents but, as expected, he did not find them. Webster was unaware of what happened to the documents that Aldworth had provided to the General Counsel at the earlier hearing in this case.

Dunkin Donuts currently employs Warren Engard as an operations manager. Engard testified about the SAP at the earlier hearing. Certain records were kept under Engard's custody. Concerning the subpoenaed records covering 1997, Engard testified without contradiction that this information was kept in computer files on Lotus spread sheets. When Dunkin Donuts moved it facility to Swedesboro, New Jersey, in 1998, the computers at the new facility were equipped with the Excel spreadsheet program and not with the Lotus program. Dunkin Donuts was unable to convert the information on the Lotus program to the Excel program, so it disposed of the Lotus files. Engard also testified that hard copies of the 1997 documents were disposed of in early 1998. This occurred before any charges were filed in this proceeding. Engard had custody of the remaining subpoenaed documents until they were taken in 1999 for use at the earlier trial. Engard has not seen the documents since then. After the subpoena was served in this proceeding Engard searched for the documents but did not find them. Two former Aldworth managers, David Mann and Tim Kennedy, also had access to the records. Engard asked them if they knew where the documents were and each answered that he did not.

The General Counsel argues that I should discredit Engard's testimony concerning his inability to locate the documents based on the following. Engard testified that he did not know the details of the earlier decision in this case, including the fact that the Board found that several employees had been unlawfully terminated. Engard explained that the decision went to the general manager. Engard also testified that he was unaware of the fact that Respondent supposedly made offer of reinstatement to certain of the discriminatees.[1] Engard explained that he was aware that a notice had been posted and the notice indicated that the employees were to be returned to work, but that was the extent of his knowledge of the matter. Engard also testified that he was not aware of the details concerning why the employees were originally terminated. The General Counsel argues that foregoing testimony is so inherently implausible that Engard's overall testimony should be discredited. However, I find nothing in foregoing testimony to be so incredible so as to warrant such a conclusion.

I conclude that Respondents failure to produce the subpoenaed documents was not because the documents would not have supported their positions but was instead due to the fact that the documents could not be located after a reasonable effort was made to do so. The case for drawing a negative inference is further belied by the fact that Respondents previously provided the General Counsel with a portion of the documents. This is hardly consistent with someone who is trying to withhold disclosure of those documents. Under these circumstances I make no negative inference from Respondents failure to produce the documents.[2]

Probationary employees

The Board remanded the issue of whether Martin Cramer was unlawfully fired pursuant to the implementation of the new SAP. The record in the prior proceeding clearly showed that Cramer was a probationary employee and probationary employees were not covered by either the new or old SAP.[3] Thus the conclusion inevitably follows that Cramer was not discharged pursuant to any SAP; rather he was fired during his probationary period before the SAPs became applicable to him. When the General Counsel did not pursue Cramer's discharge in his earlier brief I concluded, erroneously as it turns out, that the General Counsel was attempting to avoid an obvious dismissal on the merits. I found:

> The General Counsel also alleged that Martin Cramer was unlawfully discharged under the new policy. However, the General Counsel does not make that contention in his brief. At the trial it appeared that Cramer was discharged during his probationary period. I conclude that the General Counsel is no longer contending that Cramer was unlawfully terminated.

The Board reversed this conclusion and found that the General Counsel had not abandoned his assertion that Cramer was unlawfully terminated under the new SAP. I find it necessary to assess the nature of the Board's remand. If the Board's reversal was merely procedural, then the Board had before it all the evidence necessary to resolve the merits. Indeed, Respondents argued, and the General Counsel agreed, that the facts were as set forth above.[4] Moreover, the matter of whether Cramer was discharged pursuant to the new SAP or whether, instead, he was a probationary employee not subject to that policy was fully litigated in the earlier hearing and there is no contention that I am aware of that I erroneously excluded evidence on this matter at the earlier hearing. Thus, if the Board's ruling is merely procedural a remand would have been unnecessary; the Board could have reached the merits based on the undisputed evidence before it. Yet if the Board's ruling was

[1] Although Respondents did not challenge the General Counsel's assertion that offers of reinstatement were made, there is no evidence in the record to support any specific findings concerning the offers. Significantly, the record does not show whether any of these former employees actually returned to work.

[2] I am not at all certain that I should proceed beyond this point. As indicated, the Board instructed that the sole purpose of the remand hearing was to take evidence on whether the old SAP was enforced less rigorously than the new policy. No additional evidence was adduced, so there is nothing new to consider. However, because all parties again make arguments based on the prior record I will again address those arguments in the event that it might be helpful.

[3] As indicated above, the General Counsel has adduced no new evidence on this matter. Indeed, at the remand hearing the parties stipulated that warehouse employees were subjected to a probationary period of 40 *worked* days during which they were not subject the SAP.

[4] Even now the General Counsel continues to concede that Cramer "was a probationary employee, and not subject to the SAP when the policy changed" and that Cramer "was not subject to the Old SAP . . . .

meant to indicate that I should reconsider the substance of whether Cramer was unlawfully fired, it must follow that the Board was unpersuaded by the evidence before it. The Board noted:

> Irrespective of Cramer's entering the new system while under probationary status, the General Counsel argues that his termination under the harsher and more strictly enforce[d] revised system violated the Act.

Id. at 10. This is a further indication that the Board was not persuaded by the evidence before was sufficient to resolve the matter. Yet the undisputed evidence, then as well as now, is that probationary employees were not covered by either SAP and Cramer was a probationary. It must follow that Cramer was not discharged as a result of the implementation of the new SAP.

Whether the Old SAP was Enforced Less Rigorously than the New SAP

In the earlier decision I concluded that Aldworth violated Section 8(a)(3) by implementing the new SAP. The Board affirmed that conclusion. I concluded that the new SAP was harsher in some respects and more lenient in other respects compared to the old SAP. I further concluded that the new SAP was unlawful because it was an attempt to fulfill earlier unlawful solicitations of grievances and promises to rectify them.[5] The Board disagreed and concluded that the new SAP was implemented to punish employees for engaging in union activities.

In my earlier decision I applied a two-part analysis in determining whether employees were unlawfully discharged as a result of the implementation of the new SAP. First, I determined whether the new SAP itself was instituted for an unlawful reason. Then, citing *Great Western Produce,* 299 NLRB 1004 (1990), I determined whether the evidence showed that the employees would have been fired in any event under the old SAP.[6] The Board did not dispute the application of this analysis.[7] Under this analysis, I concluded that seven employees were unlawfully fired but four employees were not. The Board sustained my conclusions as to the seven but reversed as to the four.

At the hearing, the General Counsel presented no new evidence. Instead, it relied upon its assertion, rejected above, that it was entitled to a negative inference based on Respondent's failure to produce subpoenaed documents and on evidence already in the record. Based on this evidence the General Counsel argues that the new SAP was enforced more strictly that the old SAP.

The General Counsel points to findings that the Board has already made on this matter. The Board concluded that under the old SAP discipline was flexibly carried out to accommodate both Respondent's fluctuating manpower needs as well as employees' desire for time off." Id. at 148 fn. 40. It appears that the Board made these findings to show that the new SAP was harsher than the old SAP to support its conclusion that the new SAP was instituted as a reprisal and not as an implementation of promises to remedy grievances. However, the evidence in the record does not show that employees were able to avoid discipline altogether due to Respondent's manpower needs and employees' desire for time off. Rather, it was only the timing of the discipline that was affected by those considerations. Under these circumstances it is difficult to understand how this is a factor to be considered in deciding whether the discipline imposed under the new SAP as applied was harsher than under the old SAP as applied. In any event, in my first decision I concluded that under the new SAP unlawfully terminated employees Nelson, Allen, Rosenberger, and Bostic were allowed to work short periods of time after their last misconduct before they were actually fired. This was done for the same reasons Respondents delayed imposing discipline under the old SAP. The Board did not overturn those conclusions. I therefore conclude that both the new and the old SAPs were laxly enforced in terms of when the discipline was actually carried out.

The Board also concluded that the training opportunities provided under the new SAP existed more in theory than in reality. Id.[8] Thus, it concluded that by depriving employees of

[5] Warehouse employees had complained about how difficult it was to work under the old SAP. Aldworth Executive Vice President Kevin Roy promised to look into those complaints and asked the employees to trust him to keep his word and give him a chance to deal with those complaints. The Board affirmed the conclusion that these statements violated Sec. 8(a)(1). Also, Aldworth Regional Operations Manager Timothy Kennedy told an employee that the warehouse employees would like the new SAP because it would be harder for them to lose their jobs under it. Furthermore, while I did not credit Aldworth's Assistant to Executive Vice President Wayne Kundrat's testimony that the new SAP was implemented for lawful reasons unrelated to the Union, I specifically credited a portion of Kundrat's testimony that corroborated Kennedy's view of the new SAP. While the Board did not disturb my credibility resolutions on this issue, it cited my treatment of Kundrat's testimony as an example of "apparent inconsistencies" in my reasoning on this issue.

[6] Under the circumstances of this case application of the standards set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), produce the same results. That is, the issue becomes whether Respondent would have terminated the employees anyway pursuant to the old, but lawful, SAP.

[7] The Board ordered that I compare the old SAP with the new SAP to determine if it was less strictly enforced. This instruction appears to be inconsistent with the legal analysis that I applied, because the relative strictness of the enforcement of the two policies goes only to the issue of whether the new SAP was instituted in retaliation for the employees' union activities. But this issue was already resolved by the Board itself in its decision. And a comparison of the relative strictness in the application of the two policies does nothing to assist in resolving the issue of whether the employees would have been terminated anyway under the old system. That is, if the old SAP was less rigorously enforced than the new one is beside the point of whether the employees would have been terminated in any event under the old system. Moreover, although the issue at hand is only whether the employees were unlawfully terminated the Board did not limit its remand to that issue but instead appears to seek an analysis of whether the competing SAPs were in other ways more or less rigorously enforced. I shall, of course, comply with the Board's instruction and make the comparison.

[8] Under the new SAP employees who received four written warnings in a 12-week period would receive additional training and evaluation.

required additional training Respondents applied the new SAP more harshly in reality than under the written version.

Finally, the General Counsel points to the Board's findings concerning the number of employees terminated under each SAP. Specifically, the Board pointed out that stringency of the new SAP was shown by the fact:

> Within only 3 weeks, an employee's failure to meet the new performance standards could mean discharge. This resulted in the termination of 10 employees within the first four weeks under the new SAP, and another employee three months later. By contrast, a total of only seven warehouse employees had been discharged for performance errors in the approximately 22 months just prior to the implementation.

Id. at 148. Aldworth argues that Wallace, Everidge, and Nelson were terminated as a result of performance errors. However, the language cited above clearly indicates that the Board has ruled out the possibility that the employees terminated under the new SAP could have actually merited the discipline as a result of performance errors rather than the stringency of the new SAP and even though none of the three employees were fired after having failed to meet the performance goals for 3 consecutive weeks.

Next, the General Counsel referred me to the evidence in the existing record that he asserted supports the conclusion that the old SAP was less rigorously enforced than the new one. During the meetings that Respondent Aldworth conducted as part of its antiunion campaign Executive Vice President Kevin Roy said that he knew that some of the warehouse did not "work in the warehouse very well" and that he had "tolerated a lot" from them. However, I conclude that these comments are too vague to support a conclusion that Respondents enforced the old SAP less rigorously than the new one. Respondent Aldworth's Assistant to Executive Vice President Wayne Kundrat also admitted that Regional Operations Manager Tom Kennedy had discretion to reduce points assessed against an employee and adjust the discipline imposed under the old SAP and that Kennedy did so in order to make the discipline reasonable with the offense. However, as Dunkin Donut points out, the evidence shows that Respondents continued to exercise this same discretion under the new SAP. For example, in December 1998, under the new SAP Aldworth did not assess any points against employee Douglas King for the first week that he returned to work after his daughter was born and after he had been in a car accident. Moreover, as I found in my earlier decision that thenew SAP was also applied in a less harsh manner in actuality as opposed to how it was written. For example, Allen was assessed six points and should have been fired under the new SAP. Instead, however, he received only a third level written warning. Rosenberger and Walker likewise should have been fired under the new SAP as written, but they instead received written warnings. The General Counsel has not pointed to a single instance under the old SAP that an employee deserved discipline but was not given it.[9] I therefore conclude that in this regard the new SAP was enforced in a less rigorous fashion than the old SAP.

Next, the General Counsel points to documents that show that under the old SAP employees often received two or more disciplinary letters on the same day. These documents clearly show that Respondent sometimes delayed the imposition of discipline under the old SAP. But here again these document do *not* show that employees avoided discipline altogether. Moreover, as indicated above, the evidence shows that under the new SAP Respondents also delayed imposing discipline.

The General Counsel also points out that under the old SAP some employees received numerous disciplinary letters and were not terminated. For example, the General Counsel points out that employee Jesse Sellers received 19 disciplinary letters. From this the General Counsel concludes that the old SAP was laxly enforced. I disagree. As the evidence shows, under the old SAP employees were able to reduce the number of points they had accrued and thus were able proceed again up the ladder of discipline without being terminated. Thus, the number of letters received by employees shows nothing concerning whether the old SAP was laxly enforced. In fact, in my earlier decision I found:

> Under the old selection accuracy program Sellers received a wide range of discipline from cautionary warnings to a 3-day suspension. However, he was always able to reduce his points to zero and avoid the final step—termination. Sellers converted to the new system with one point assessed against him.

Id. at 91. The Board did not reverse these findings. It follows that this argument must be rejected.

Finally, the General Counsel argues the Nelson and Everidge had a history of selection accuracy problems since the beginning of his employment. Despite these problems Engard, then Respondent Dunkin Donuts' warehouse supervisor, told Nelson that Nelson has selection accuracy problems but that Engard would make an exception and give Nelson a chance as a regular full-time employee. But again, I fail to see how this is evidence that the old SAP was enforced in a more lax fashion than written. Engard's decision to take a chance and allow Nelson to convert to a regular employee shows only that Engard took a chance in expecting that Nelson would be able to meet the standards. And, as pointed out above, the number of disciplinary letters alone shows nothing concerning the laxity of the enforcement of the SAPs.

To summarize, the Board has already concluded that new SAP was less harshly enforced in reality than as written when employees were not required to undergo additional training. It has also concluded that the new SAP was more stringently enforced based upon the relative numbers of employees who were fired under each SAP. I have not found any other examples of where the old SAP was enforced less rigorously than the new SAP. The difficulty, however, is that none of these find-

In addition, employees who were assessed four points also were to be assigned additional training.

[9] Respondent Dunkin Donuts concedes that Everidge was given two consecutive final warning on July 25 and August 1, 1998. It argues that this was nothing more than an administrative mistake.

ings are useful in resolving the issue of whether the employees would have been terminated anyway under the old SAP.

General Counsel's Remaining Arguments

As noted, the General Counsel has argued that the old SAP was less rigorously enforced than the new. But it is significant that the General Counsel does *not* argue that the four employees would not have been terminated as a consequence of the laxity. In other words, the General Counsel does not connect the laxity with the terminations. Instead, the General Counsel makes two additional arguments.

The General Counsel argues that under the old SAP Nelson, Everidge, and Wallace would have lowered the number of points assessed to them because they worked for periods of time with no selection accuracy problems. By doing so the General Counsel is arguing that under the old SAP *as written* these employees would not have been terminated.[10] Yet the Board did not disturb my findings that under the old SAP *as written* these employees would have been fired. Indeed, if it felt the existing record showed, as the General Counsel argues, that the employees would not have been fired under the old SAP even as written a remand would have been unnecessary. I therefore decline to consider this argument.

The General Counsel makes a similar, but slightly different argument. It will be recalled that as part of the transition from the old to the new SAP employees were assigned a certain number of points that they would carry with them into the new SAP. The General Counsel argues that Nelson, Everidge, and Wallace were incorrectly assigned points because in the period immediately before the assignment they worked for periods of time without any selection accuracy problems and therefore were entitled to a lower number of points. But here again I specifically addressed that matter in my earlier decision and the Board did not disturb those findings. In fact, the Board cited, with apparent approval, the specific number of points assigned to the employees. I therefore also decline to consider this argument also.[11]

ORDER

Based on the foregoing, I affirm my previous ruling that Nelson, Everidge, Wallace, and Cramer were not unlawfully terminated.

[10] As Respondent Dunkin Donuts points out, in its earlier brief the General Counsel conceded that Everidge and Wallace would have been terminated under the old SAP. I noted this fact in my earlier decision and relied upon it in dismissing those allegations. The Board did not disturb my finding that the General Counsel made those concessions.

[11] It should not escape notice that in both of these arguments the General Counsel is pointing out how the old SAP was enforced more rather than less rigorously when Respondents failed to assign employees the lower number of points that they otherwise would have been entitled to under the program as written.